UNITED STATES OF AMERICA

BEFORE THE NATIONAL RELATIONS BOARD

REGION 15, SUBREGION 26

PHILIPS ELECTRONIC NORTH AMERICA

CORPORATION

and **Case 26-CA-085613**

LEE CRAFT, AN INDIVIUDUAL

10452 Motions for Reconsideration Under Sec.102.48

The board has said that Philips did maintain an unlawful rule and they enforced that rule upon Lee Craft because it is documented in Lee Craft disciplinary form. How can the board then say that Lee Craft's discharge was lawful because the reason Lee Craft was discharged was because Sherri McMurrian documented that Lee Craft discussed his disciplinary with fellow co-workers, see (22/28 Exb. R-14). Lee Craft submitted documentation (e.g., emails sent to human resources due to there being no human resources on site at the Memphis facility and contacting employee hotline) regarding numerous complaints and concerns that fell upon deaf ears. Lee Craft followed the rules went through the proper chain of command, but Philips allowed Sherri McMurrian and her management staff to engage in unlawful practices on anyone of her choosing. Sherry McMurrian was judge and jury at the Memphis facility and if anyone questioned her they became a target which she included a lot management staff in bullying and unlawful practices. This was and is too much power for Philips to allow Sherri McMurrian to have. She was and is still dangerous because the employees at the Memphis facility know the company supports her in her unlawful practices which intimidate the employees and makes them fearful of losing their jobs.

Judge Margaret G. Barkebusch did not consider the facts at all, she based the entire case on my demeanor not the facts and evidence presented by Bill Hearn of the NLRB (I was told by Mr. Hearn to answer the questions truthfully and not be confrontational on things they may say that are not true). The judge also overlooked Rolita Turner's Testimony of Lee Craft chasing her on the expressway at high rate of speed. Mr. Hearn questioned her regarding if a police complaint was filed and her response was no. He also questioned her regarding what month, date and time this happened to her (Rolita Turner) and she responded she did not remember. Mr. Hearn then questioned Rolita Turner regarding who she did tell, and Rolita Turner responded that she told Sherri McMurrian who is the judge and jury.

Philips has a policy regarding workplace violence. Kim Coleman has violated this policy numerous times. She testified that an employee—Roy—hit her first, and she hit back. This was a lie. The employee Roy never hit her, but she did hit him and they fired him and kept her. In another incident involving another employee Tamera Hamilton, she and Kim Coleman had an altercation which resulted in Tamera Hamilton being fired but nothing was done to Kim Coleman. A harassment complaint was filed against Lee Craft, and once he was made aware of the complaint Lee Craft contacted the Memphis Police Department to find out what his rights were concerning being falsely accused. When he was told the issue was a company matter, Lee Craft contacted the employee hotline and human resources department making them aware of what was said to Lee Craft by management. Sherry McMurrian told Lee Craft there would be a meeting with Lee Craft, Kim Coleman, and management. However, after Lee Craft told the human resources department that he had contacted the police and made a statement on the employee hotline, he was told a couple days later by supervisor William Gordon that the meeting was canceled. Lee Craft contacted human resources again and was told by Palak Dwivedi that management felt like the meeting would be non-productive. If management took this accusation seriously, why was the meeting never held? Lee Craft sent an email explaining to human resources that a lie is nothing for anyone to tell. In the interests of obtaining a fair and honest investigation, Lee Craft also requested for human resources to investigate the issues in person, not on the phone with same people that management fraternized with.

I, Lee Craft, have been falsely accused by Sherri McMurrian, Rolita Turner, Kim Coleman, Thelma Halbert, and Gerak Guyot. Again I was fired based on showing my disciplinary form not harassment allegations to which human resources responded that management felt a meeting would be non-productive for such a serious situation.

Judge Margaret G Barkebusch was biased in her decision, overlooking all the facts and witnesses submitted by Bill Hearn on Lee Craft's behalf. Sherry McMurrian and Mason Miller made a mockery of the judicial system based on lies and last minute documentation submitted. Judge Barkebusch based her decision on Lee Craft's demeanor, stating that he was not credible. How was Lee Craft not credible? He had documentation with dates and times, witnesses, contacted human resources by phone and email, called the company hotline, and also contacted President Ed Crawford regarding the situation. All his requests and concerns fell upon deaf ears, and Philips Electronic North America Corporation allowed the management staff at the Memphis facility along with Human Resources Worker Palak Dwivedi in New Jersey commit defamation of character and use bullying tactics upon Lee Craft and other employees.

I am not afraid of bad people who do bad things, those who commit and unlawful acts and break the law, but what I am afraid of is when good people who witness these things uphold the unlawful actions of the others by not doing or saying anything when help is requested and it is within their power to help. All Lee Craft is requesting is for a fair and impartial party to review the case and look closely at the documentation that was submitted along with witnesses who testified on Lee Craft's behalf. Mr. Hearn cross-examined Sherry McMurrian, Rolita Turner, Kim Coleman and Thelma Halbert, Gerak Guyot, and Lester Peter, and there were several inconsistencies in their testimonies that Judge Margaret G. Barkebusch chose to overlook along with all of Lee Craft's submitted documents and the witnesses that testified on his behalf.

If Judge Margaret G. Barkebusch's ruling—that Lee Craft's discharge was lawful—is upheld, you are telling the people at Philips Electronic North America Corporation and everyone who is employed by any company or corporation that regardless of any evidence submitted the employer has the right to wreak havoc in your life.

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2014 a copy of the request for reconsideration in support of exceptions to the decision of the Administrative Law Judge was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on September 10, 2014, copy of the request for reconsideration in support of exception to the Decision of the Administrative Law Judge was served via Email on the following:

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Lee Craft

Gibson no longer worked for Respondent. (Tr. 170). Employees are assigned to one of four departments: Ballast, Professional, Consumer and Receiving. (ALJD 2:17-18; Tr. 175).

III. FACTS CONCERNING THE DISCHARGE OF LEE CRAFT

A. Lee Craft Employment History

Charging Party Lee Craft worked for Respondent from February 2003 until his discharge on January 25, 2012. (ALJD 2:32; Tr. 45-6). With the exception of his final five days of employment, Craft was assigned to the Ballast department throughout his tenure with Respondent. (ALJD 2:32-34; Tr. 46). Craft worked as a lead employee for Respondent in the Ballast department from about April 2010 to about July 25, 2011. (ALJD 2:34-35, 4:13-23; Tr. 48-9). At all other times during his employment, Craft worked as a warehouse associate where his duties included picking orders, operating forklifts and other equipment, and performing other duties as assigned. (Tr. 46-7). At the time Craft started working as a lead, he was supervised by Gene Blinstrup, who ceased working for Respondent in 2011. (ALJD 2:34-35; Tr. 49). In October 2010, Rolita Turner replaced Blinstrup as supervisor. (ALJD 2:40-41; Tr. 49). Turner continued to supervise Craft until he was transferred out of the Ballast department on January 20, 2012. (ALJD 2:40-42; Tr. 50).

From the time he started working for Respondent until February 2011, Craft had not been disciplined for any reason. (Tr. 50). After Turner became his supervisor, Craft received a series of verbal and written warnings for performance issues related to his performance of the lead duties. (ALJD 3:4-14; Tr. 50; RX 2-5). The performance issues cited by Respondent in these warnings all related to either the failure to ensure that orders were shipped in a timely manner and excessive overtime worked by Craft and employees in his area. (ALJD 3:4-14; RX 2-5). On

July 25, 2011,[2] Respondent issued another written warning to Craft for unsatisfactory performance and demoted him from the lead position to his former warehouse associate position in the Ballast department. (ALJD 4:13-23; Tr. 50-1; RX 6). Other than performance issues, the July 25, 2011 warning notice prepared by McMurrian also states that Craft held a meeting with his team employees on July 10, 2011 where he allegedly threatened, berated and yelled at his team employees. (ALJD 4:15-18; Tr. 189-91; RX 6).[3] The warning notice also reads that employees Kim Coleman and Uma Jalloh perceived Craft's behavior toward them as harassment. (ALJD 4:18-20; RX 6). Jalloh did not testify at the hearing and, according to McMurrian, refused to provide any details to her. (Tr. 246-7). Coleman complained to McMurrian that Craft was pulling her off her regular duties on returns and instructing her to pick orders and then criticizing and yelling her when she refused his instructions. (ALJD 3:43-46; RX 7). Coleman admitted that, as her lead, Craft could direct her on what work to perform and that she did not have the authority to refuse to perform work when asked to do so by a lead employee. (Tr. 362-3). Nonetheless, Coleman claimed that Craft's instructions and behavior toward her when she refused his instructions were harassment and McMurrian spoke with Craft about this. (ALJD 3:46-4:5; RX 7).

B. Craft's Participation in the Minute to Shine during Pre-Shift Meetings (Exceptions 1, 11 and 12)

Each work day at the start of the first shift, Respondent holds a pre-shift meeting for employees working on that shift. (ALJD 5:46-6:2; Tr. 30-1, 52, 160-1). Both employees of

[2] In her decision, the Judge incorrectly states that the date of this discipline was July 15, 2011.

[3] McMurrian testified that she received information about the July 10, 2011 meeting from lead employee James Powell. However, Powell did not testify at the hearing about what he actually witnessed. (Tr. 189-91). McMurrian testified that she and Turner spoke with employees who were present at the meeting who corroborated the claims made by Powell but the information they claim they received from these employees was not documented by them or presented as evidence at the hearing. (Tr. 250-2). Employee Kim Coleman claims she was present at this alleged meeting but, despite making other reports about Craft to McMurrian about this same time, her information about this meeting was not documented by McMurrian. (Tr. 343).

Respondent and temporary employees of Adecco attend these meetings. (ALJD 6:1-2; Tr. 30-1, 52-3, 160-1). The employees from all the departments attended the same meeting. (ALJD 6:1-2; Tr. 30-1, 52-3, 160-1). The meetings are held in an open area on the work floor in the Consumer department. (Tr. 417). The meetings are usually conducted by the leads but supervisors occasionally attend and participate in the meetings. (ALJD 6:2-3; Tr. 54, 416-8). The leads from the different departments would discuss work-related matters, such as the work to be performed that day, during the majority of the meeting. (ALJD 6:3-4; Tr. 54, 420). After the leads finished speaking, employees were given the opportunity to speak during what Respondent called, "A Minute to Shine." (ALJD 6:4-7; Tr. 32-3, 54-5, 160-2). Any employee at the meeting, including the temporary employees, could participate in the Minute to Shine by just going up to the front of the group and speaking. (Tr. 55; 422). The Minute to Shine was implemented by supervisor Turner in 2010 after she became supervisor. (ALJD 6:4-7; Tr. 54-5, 465-6). Turner testified that she started the Minute to Shine to give employees a chance to discuss positive things that have happened in their lives. (ALJD 6:7-9; Tr. 441-2). After the Minute to Shine was implemented, employees used the opportunity to speak about work-related matters.

Craft testified that, after the Minute to Shine started, he spoke during the Minute to Shine about three times a week. (ALJD 6:9-10; Tr. 55). Craft did this both when he was still a lead and after his demotion. (Tr. 55-6). Craft testified that, when he spoke during the Minute to Shine, he was trying to motivate employees to do a better job and exhibit teamwork during the work day. (ALJD 6:10-12; Tr. 55-6). Craft said that he would communicate this through speeches or songs, where he would re-do the lyrics of a song to make it applicable to their work. (ALJD 6:10-12; Tr. 56; GCX 3, 4). Craft said that he would use all different types of songs, including popular music and gospel music, during the Minute to Shine. (Tr. 56). Craft said he would also try to bring

some humor to the meeting, such as when he reworked phrases he commonly heard from certain employees into a version of "The 12 Days of Christmas." (Tr. 59-60; GCX 4). Craft testified that he continued to regularly participate in the Minute to Shine until it was stopped in or around late December 2011. (Tr. 63-4).

Former and current employees who testified at the hearing all testified that Craft was almost always positive when he spoke or performed during the Minute to Shine and that he focused on bringing employees together to do a better job or taking accountability for their work while Kim Coleman characterized Craft's statements during the Minute to Shine as always negative. (ALJD 6:14-20; Tr. 34-5, 163, 348-50, 422-3). Respondent witness Lester Peete, a team lead, testified that Craft was, for the most part, positive in his statements during the Minute to Shine and that Craft spoke about team work among the employees and employees working together. (ALJD 6:14-16; 422-3). Peete, however, is the only witness, other than employee Kim Coleman, whose testimony on this issue is discussed by the Judge.[4] Peete's testimony about Craft's statements is corroborated by General Counsel witnesses Lexie Campbell and Sherry Grey. Lexie Campbell, a former temporary employee at Respondent's warehouse, testified that, when Craft participated in the Minute to Shine, Craft tried to be uplifting to bring employees together and to try to get them to work together. (Tr. 32-36). Sherry Grey, also a former temporary employee, testified that Craft's statements in the Minute to Shine were positive and that he tried to encourage employees to do a good job and take responsibility for their work. (Tr. 160-4).

[4] General Counsel presented three fact witnesses to corroborate the testimony of Craft: Lexie Campbell, Sherry Grey and Markus Bernard, former temporary employees who worked at Respondent's warehouse in the Ballast department along with Craft. The Judge's decision does not reference the names or testimony of any of these witnesses at any point in her decision, such that a reader of the decision alone would not know that General Counsel presented any evidence other than the testimony of Craft.

Kim Coleman was the only other employee who testified about Craft's statements during the Minute to Shine. Coleman initially testified, contrary to the other employees, that Craft was always negative about Respondent and his managers and supervisors when he spoke during the Minute to Shine. (ALJD 6:18-23; Tr. 348-50). The Judge, however, fails to note that Coleman later admitted that Craft sometimes did have positive things to say during the Minute to Shine but that, in her opinion, the things he discussed were negative and not the kinds of things to discuss during the Minute to Shine. (Tr. 368-71). While Turner testified that what Craft discussed during the Minute to Shine was outside of what she intended and that she was aware of what he was discussing during the Minute to Shine, she admitted that, as Craft's immediate supervisor, she never discussed or raised this issue with him at any time before the Minute to Shine period was stopped by Respondent in early January 2012. (Tr. 442, 466-7).

C. Respondent's December 2011 Investigation of Craft (Exceptions 3 and 4)

In late December 2011, Respondent initiated an investigation of Craft after McMurrian met with Coleman and Coleman made several allegations against Craft. (ALJD 4-5; Tr. 199-201). On December 22, 2011, McMurrian received a report from supervisor Turner that Coleman believed that Craft had left a recording device next to the phone on a desk she used during the work day in order to record her phone calls. (RX 16). McMurrian had operations manager Guyot investigate this and he discovered that the "recording device" alleged by Coleman was a Playstation Portable hand-held videogame system[5] which Craft had set on a desk used by multiple employees in the Ballast department, including Coleman. (Tr. 326-7; RX 16).[6] The Judge notes that McMurrian documented that she had previously spoken with Craft in June

[5] Craft admitted that the Playstation Portable game system was his to both Coleman and Guyot. (Tr. 112-5). Craft testified without rebuttal that he had the game system with him at work to use during breaks and that it could not be used to record audio or take pictures. (Tr. 112-5).

[6] In her testimony, Coleman confirmed that the device examined by Guyot was the same device she claimed Craft left next to her phone to record her conversations and later claimed he used to attempt to take pictures of scrap material she discarded as part of her work. (Tr. 373-5).

2011 about using recording devices on the work floor. (ALJD 4:46-5:4; RX 16). McMurrian testified that unnamed employees had told her that Craft was holding his cell phone where it would appear he was recording people and that Craft denied that he was attempting to record anyone or any conversations. (Tr. 306-7, 314; RX 16).

Then, on December 26, 2011, Turner brought Coleman to McMurrian's office and said Coleman needed to speak with McMurrian. (ALJD 5:6-7; RX 16). In the meeting, Coleman made several allegations against Craft, including that he was harassing her; that he was trying to make her think he was recording her phone calls; that he was threatening to get her fired; that he was taking pictures of her scrap material and questioning her about her work; that Craft told her to get down on her knees and apologize to him after he discovered an error she had made; and that she was in fear for her life. (ALJD 5:6-19; Tr. 200-1; RX 16). On December 27, Coleman contacted McMurrian after work about statements allegedly made by Craft to lead employee Antonio Edwards. (RX 16). Coleman told McMurrian that she observed Craft speaking with Edwards and thought the conversation might have been about her. (RX 16). After Craft left, Coleman asked Edwards what he was discussing with Craft because she thought it was about her and Edwards informed her that Craft said that he was going to start making some changes around there and he was going to fix it so no one had to kiss butt to move up the ladder. (RX 16). McMurrian later confirmed these comments with Edwards. (ALJD 5:22-24; RX 16).

Following this meeting, McMurrian spoke with several different employees about the allegations made by Coleman. As noted above, Edwards confirmed that Craft told him that he was going start making some changes around there and make it so employees did not have to kiss butt to move up the ladder. (ALJD 5:22-24; RX 16). McMurrian documented that lead employee Len Lee thought that Craft had "bad blood" for Coleman and employee Latoya Hyde

opined that she thought that Craft had problems with single women working on the warehouse floor. (ALJD 5:24-27; RX 10). Neither Lee nor Hyde testified at the hearing and neither worked in the Ballast department or directly with Craft or Coleman. (Tr. 262, 268). Employee Thelma Halbert told McMurrian that she had observed Craft making comments to Coleman that he was going to get rid of her and that she should have been fired; that Coleman told her that Craft had made other statements to her and that she feared for her safety; that Coleman told her that Craft appeared to be monitoring and taking pictures of her scrap output; and that she thought that Craft did not believe that women should be in charge of the facility. (ALJD 5:27-30; RX 10, 19).

Following these interviews, McMurrian met with Craft about the accusations against him. (ALJD 5:32-33; Tr. 73-77). Supervisors Odum and Gibson were also present. McMurrian told Craft that Coleman had reported that he had been harassing her. (ALJD 5:33; Tr. 74). In her decision, the Judge writes, "Craft testified that although McMurrian had given him specific details, he had not asked for any details." (ALJD 5:33-34). Craft, however, specifically testified that he was not provided any details concerning the allegations of harassment. (Tr. 73-77). Craft testified that he was told only that Coleman had alleged he was harassing her, he was watching her work and she was afraid he might harm her. (Tr. 74, 128-9). Craft specifically denied that he was provided with any details beyond these general allegations. (Tr. 74, 128-9). Craft's testimony on this issue is supported by his December 29, 2011 email to Palak Dwivedi, who works in human resources for Respondent. (GCX 5, p.8) In this email, Craft writes that, in the December 28, 2011 meeting, he was told he was harassing Coleman and that Coleman felt like Craft would harm her but he does not mention any specific allegations which Respondent claims were raised in the meeting. (GCX 5, p.8). McMurrian testified that she discussed Coleman's allegations with Craft but, in her testimony, she does not specify what allegations she actually

raised with him or Craft's specific responses to the allegations of harassment. (Tr. 207). McMurrian goes on to testify that, in the meeting, Craft denied all the allegations against him. (Tr. 207). McMurrian then asked Craft why Coleman would feel afraid of him and Craft responded that he did not know, that McMurrian would have to speak with Coleman and that he could not speak for Coleman. (ALJD 5:36-37; Tr. 74, 207-8). McMurrian then told Craft that she had received reports that he had threatened management and made comments about replacing management. (ALJD 5:40-42; Tr. 75). McMurrian testified that the statements which she felt were threatening toward management were that statements by Craft, including "We have to stop this now," and "We do not need to kiss butt to move up the ladder," which were reported to her by Edwards. (Tr. 267-270). The Judge writes that Craft denied making statements threatening management and about replacing management, but does not note that Craft testified that he denied the statements as attributed to him by Edwards and told McMurrian what he remembered saying to Edwards. (ALJD 5:42; Tr. 75-6). While McMurrian's meetings with other witnesses were documented by her, she admitted that she did not prepare any memo memorializing the December 28, 2011 meeting with Craft following the conclusion of the meeting. (Tr. 280).

D. Respondent's Additional Investigation of Craft (Exception 5)

Following the December 28, 2011 meeting, Respondent continued to investigate Craft. McMurrian had operations manager Guyot prepare a memo, dated January 3, 2012, about issues Respondent had had with Craft prior to that time. (ALJD 6:27-35; Tr. 323-6; RX 17). In this memo, Guyot writes specifically about problems and issues which had occurred when Craft worked as a lead employee. (RX 17). While the Judge writes that Guyot also discussed performance issues Craft had as an hourly employee in the January 3 memo, Guyot testified that

all the performance issues he discussed in the memo concerned Craft's performance as a lead, which is a position he had not held since July 25, 2011. (ALJD 6:27-35; Tr. 323).

Also on January 3, 2012, McMurrian, as part of her investigation, met with lead employee Lester Peete about Craft's speeches and songs during the Minute to Shine period in pre-shift meetings (Tr. 404-5). McMurrian took notes during this meeting and had Peete review and sign the notes at the end of the meeting. (Tr. 404-5; RX 18). McMurrian's interview with Peete, which reflects her continued focus on Craft's statements during the Minute to Shine period of the pre-shift meetings, is not referenced in the Judge's decision. In the notes, Peete describes a meeting the previous week where Craft spoke and did a song where he talked about how he was going make changes at Respondent's facility to make things better and everybody had to look out for and take care of each other around there. (RX 18). The memo also states that Peete had been trying to get Craft to scale back on singing in the pre-shift meetings because other employees did not appear to understand what Craft was discussing or trying to convey to them. (RX 18). The memo further notes that the leads did not give employees much time to speak during the Minute to Shine anymore because of Craft's actions creating a negative output from the meeting. (RX 18). In his testimony, he stated that Craft was almost always positive and usually had something good to say during the Minute to Shine. (Tr. 406, 422). Peete said that Craft was often speaking about teamwork among the employees and making things better at work. (Tr. 422-3). Peete said that Craft got animated sometimes, such as an instance where Craft spoke after employee James Powell was discharged. (Tr. 406-7). Peete testified that the leads received instructions from management in late 2011 to scale back the Minute to Shine period because employees were standing around after the pre-shift meeting talking about what Craft

said and because of employees, including Craft and Willie Reel, who were referencing religion in the statements they gave during the Minute to Shine. (Tr. 426-9).

On January 4, 2012, Coleman provided a handwritten statement to McMurrian making new allegations against Craft and providing additional details about her prior allegations. (ALJD 6:37-39; RX 9). Coleman alleged that several years prior, when the Ballast department was in a different facility, Craft had asked her out on a date and that she had refused. (ALJD 6:39-40; RX 9).[7] Coleman alleged that Craft, after he observed her using her cell phone to listen to the radio during work time, attempted to have her removed from the facility by a security guard. (ALJD 6:43-45; RX 9). Coleman did not state the date when this occurred but, in testimony, Coleman said that it had occurred in 2010 prior to Turner becoming a supervisor (which was in October 2010). (ALJD 6:43-45; Tr. 365-8). Coleman also wrote that the statements Craft gave during the Minute to Shine would "always be about me and the Company not doing the right thing and the manager and supervisors not running the facility right." (RX 9).

Lastly, McMurrian became aware of two performance issues related to Craft's work. According to Respondent, on January 4, 2012, Craft picked the wrong item when filling an order and the order was shipped to the customer with the wrong item and, on January 16, 2012, Craft made an error on a computer when, in attempting to add a delivery to a different order, added all deliveries for the day to a single order. (ALJD 7:1-4; GCX 6).

While not cited in the Judge's decision, McMurrian admitted that, despite additional allegations being made against Craft by Coleman, she did not attempt to meet with him or question him about these additional allegations prior to him being issued a final written warning

[7] The Ballast department was moved from a facility on Mendenhall Road in Memphis, Tennessee, to the present facility in 2007. (Tr. 258)

on January 20, 2012. (Tr. 280). For his part, Craft, in his testimony, specifically denied all the allegations made against him by Coleman. (Tr. 106-7).

E. January 16, 2012 Initial Decision to Discharge Craft (Exceptions 11 and 12)

McMurrian testified that, following this investigation, she and the other members of management decided that Craft should be discharged. (ALJD 7:8-18; Tr. 204) McMurrian prepared a memo dated January 16, 2012 which included the reasons why she and other managers believed that Craft should be discharged. (ALJD 7:17-18; Tr. 204; RX 11). The Judge, in her decision, briefly covers this memo, but leaves out several details which are vital to understanding the motivations for Respondent's decision to discharge Craft.

In the memo, McMurrian first mentions briefly that she and other supervisors had met with Craft on December 28, 2011 and taken evidence from other employees. McMurrian then wrote that she informed Craft that, "the comments he was making in the pre-shift meetings and to other employees were being perceived as him working against the company and were threatening in nature." (ALJD 7:12-14; RX 11). McMurrian specifically cites portions of comments, taken out of context, by Craft, including, "we have to stop this now," and "we do not need to kiss butt to move up the ladder." (RX 11). McMurrian wrote that these comments were "negative, intimidating and demoralizing to the employee's [sic] environment." (ALJD 7:12-14; RX 11). McMurrian also testified that she found these statements, made to other employees, to be threatening toward management. (Tr. 267-70). McMurrian then describes the incident where Coleman alleges that Craft told her to kneel down and apologize to him after he found an error she made. (RX 11). McMurrian writes that Coleman reported the incident to Thelma Halbert after it occurred and Halbert confirmed that she had to get Coleman to calm down before

Coleman would tell her what had happened. (RX 11).[8] McMurrian then discusses the incident from 2010 when Craft allegedly tried to have Coleman removed from the facility after he observed her using her cell phone to listen to the radio. (RX 11). McMurrian goes on to write that supervisor Turner had reported that Craft was undermining and belittling Turner as his supervisor and mentions issues which date back to when Craft had been a lead. (RX 11).[9]

McMurrian concludes by writing that Craft's "persistent efforts to demoralize the company and representatives of the company are unacceptable. The comments made to other employees and during company meetings are intended to undermine the efforts of the company and management team." (RX 11). McMurrian wrote that Craft was interfering with operations by his disruptive behavior and his interruptions of pre-shift meetings with inappropriate comments, singing and dancing. (RX 11).[10] McMurrian wrote that, despite Craft's prior documented coaching sessions and disciplinary actions, he was continuing to display inappropriate and demoralizing behavior and should be discharged. (ALJD 7:15-17; RX 11). McMurrian testified that Craft was not discharged because he had not previously been provided a final written warning. (ALJD 7:20-22; Tr.215-6; RX 12).

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[8] In her testimony, Halbert said that she actually witnessed the incident and reported to McMurrian that she had seen Craft tell Coleman to kneel down and apologize to him. (Tr. 484-5; 504-5). However, in the various memos McMurrian prepared during the investigation of Craft, including the statement provided by Halbert, McMurrian does not document that Halbert ever informed her that she witnessed the incident and McMurrian testified that no employees informed her that they witnessed the incident (Tr. 315; RX 10, 11, 19). Furthermore, Respondent's attorney at the hearing did not seem to be aware that Halbert would claim that she witnessed this incident when she testified. (Tr. 484-5).

[9] The January 16, 2012 memo mentions generally that Craft had allegedly undermined Turner but, during her testimony, Turner did not provide any specific details about any undermining conduct by Craft since his demotion from the lead position in July 2011. (Tr. 439-440). Turner admitted that she never produced any notes documenting the occurrences when Craft allegedly engaged in undermining behavior and was not asked by McMurrian to provide a statement for the investigation of Craft. (Tr. 467-8).

[10] McMurrian testified that, in this part of the memo, she was referring to what she described as negative comments by Craft and his speeches and songs during the Minute to Shine. (Tr. 266-7, 274-6). McMurrian admitted that Craft never interrupted the leads during the pre-shift meetings and that he, like other employees, had permission to speak during the Minute to Shine portion of the pre-shift meeting. (Tr. 274-6).

F. January 20, 2012 Final Warning (Exceptions 6, 11 and 12)

On January 20, 2012, McMurrian met with Craft and issued him a final written warning. (Tr. 79, 217). The final warning notice, prepared by McMurrian, reads that Craft is being disciplined for several different reasons. McMurrian first says that Craft has engaged in highly disruptive behavior in pre-shift meetings. (ALJD 7:25; GCX 6). The warning then reads that Craft was using harassing and intimidating language toward colleagues and management. (GCX 6). McMurrian testified that this included the statements by Craft in and outside the pre-shift meetings to other employees about Respondent and that, to her, it "just seemed like [Craft] was working against what everybody was trying to do instead of trying to work with everyone there, with the supervisor, with the leads, with management." (ALJD 7:30-33; Tr. 219, ll.13-16). The document also refers to the performance issues discussed above. (GCX 6). McMurrian decided that, in addition to the warning notice, Craft would be transferred to the Professional department. (Tr. 221). McMurrian testified that she informed Craft that he should stay away from Coleman's work area after his transfer, but did not include this instruction in the warning notice. (Tr. 221, 224; GCX 6). Craft started work in the Professional department on the following day. (Tr. 90).

In her decision, the Judge states that the Professional department, where Craft was transferred, was "in an entirely different building." (ALJD 7:38). The Judge likely based this finding on a statement by McMurrian where she described the Professional department as being in a "totally different building." (Tr. 221). However, the diagrams of Respondent's facility placed in evidence at the hearing and the testimony of witnesses establishes that this finding is in error. A diagram, entered into evidence as Respondent's Exhibit 13, shows that the departments operated by Respondent are all contained in one large warehouse and the departments are separated only by walls. (RX 13) Craft testified that, when he reported for work, he clocked in at

a time clock near the break room in the Consumer department, and then walked down an aisle that passes through Ballast to get to the Professional department. (Tr. 90-92; RX 13). The returns area where Coleman worked was in the Ballast department next to the main aisle. (GCX 17; RX 13). The Professional department and Ballast department were side-by-side in the warehouse, separated only by a wall. (Tr. 90-2; GCX 17; RX 13). The specific work area to which Craft was assigned to work in the Professional department was about 50 yards away from the entrance to the Ballast area. (Tr. 131). McMurrian admitted in her testimony, that by placing Craft in the Professional department, he would have to pass through the Ballast area every morning and afternoon using the main aisle through the facility. (Tr. 90-2, 285-7). In addition, McMurrian further admitted that, if Craft had an issue with his forklift or other equipment, he would have to use the recharging area, which is located directly across the main aisle from Coleman's work area. (Tr. 90-2, 225; GCX 17; RX 13). Thus, the instruction to stay completely out of Ballast and away from Coleman's work area was an effectively impossible demand placed on Craft by Respondent.

G. The January 24, 2012 Investigation of Craft (Exceptions 7 and 8)

McMurrian testified that, on January 24, she received reports from "multiple" employees that Craft was going into the Ballast area and making statements about his January 20 warning notice. (ALJD 8:1-3; Tr. 224-5; RX 14). In the decision, the Judge writes that McMurrian received reports that Craft had taken the forklift from the Professional department and had gone back into the Ballast work area. (ALJD 8:2-3).[11] The Judge states that Coleman testified that Craft came to her work area and, while sitting on his fork lift about 10 feet away from Coleman, bragged that McMurrian had done him a favor by moving him because he would no longer have

[11] As described below, only one employee, Coleman, actually made this claim to McMurrian. Despite her testimony that Halbert was present, Halbert does not corroborate Coleman's testimony.

to move the heavy ballasts and said he was untouchable. (ALJD 8:3-8, 13-14, 16-18). The Judge then states that both Coleman and Halbert testified that, when Craft came into the Ballast department, he showed his disciplinary warning to employees and spoke loudly. (ALJD 8:11-13). Finally, the Judge states that employee Fred Smith (who was an employee in the Professional department) informed supervisor Odum and McMurrian that Craft had shown his warning notice to him. (ALJD 8:18-19).

This description by the Judge of the evidence concerning McMurrian's investigation omits the entirety of McMurrian's January 24 memo which reflected the information she received during the investigation. (RX 14). The memo reads first that two employees, Coleman and Halbert, reported that Craft was showing his discipline form to other employees on the work floor and, "[t]hese employees are aware that disciplinary action forms are confidential information and should not be shared on the warehouse floor at anytime, much especially during working hours." (RX 14). McMurrian writes that both employees knew what was on the discipline form which confirmed that Craft had been showing other employees the form. (RX 14). McMurrian also writes that Coleman said she heard from other employees (who she refused to name) that Craft was stating that the discipline was because Coleman filed harassment charges against him. (RX 14).

In the second paragraph, McMurrian describes the incident where Coleman alleges that Craft drove into the Ballast area on his forklift and said, loud enough for everyone to hear him, that he was untouchable, that management had done him a favor by moving him out of Ballast and he would not have to pick up the heavy ballasts anymore. (RX 14). McMurrian also writes that, "Kim stated he was purposely showing the write-up which he knows is confidential information so it would get back to her like she was the blame." (RX 14).

McMurrian then writes that Halbert knew every word on the disciplinary form and that she said Craft had been showing it off to other people in the warehouse. (RX 14). McMurrian wrote that Halbert said a co-worker (who she refused to name) told her that Craft said, "I am glad I was moved, don't have to worry about lifting ballast." (RX 14). McMurrian then wrote that Halbert informed her that Markus Bernard said that something is wrong with Craft; that he worked with Craft somewhere else and Craft was a problem then; and that Craft had been fired from another job for the same problems. (RX 14).

Finally, McMurrian wrote that supervisor Odum approached Fred Smith because he had heard that Craft had shown his warning notice to Smith. (RX 14). Odum reported to McMurrian that Smith said Craft approached him during work time in the Professional department and showed him the discipline form. (RX 14).

The Judge's description of the events between January 20 and 24, 2012 also omits the full testimony of the witnesses at the hearing. Coleman testified that, on the day of his transfer, Craft came to the Ballast area on his forklift from the Professional department, stopped about 10 feet away from her work area and loudly made the statements described above. (Tr. 355-9). Coleman however also testified that Halbert was at the main station with her and Uma Jalloh was also present when Craft engaged in this conduct. (Tr. 359-60, 388). Coleman also testified that she believed that Markus Bernard was present and that Craft may have been speaking with Bernard when he made the statements. (Tr. 384). While the Judge wrote that Coleman testified that Craft showed his warning notice to employees when he returned to the Ballast area, Coleman did not ever make such a claim in her testimony.

As noted above, when McMurrian spoke with Halbert on January 24, 2012, Halbert told McMurrian that she had heard from another unnamed employee that Craft had said he was glad

he was moved and that he did not have to lift heavy ballasts anymore and that Markus Bernard witnessed and commented on Craft's behavior. (RX 14). At the hearing, Halbert testified that she recalled Craft, after he had been up in the office, was walking in the main aisle, waving a piece of paper and saying that the transfer to Professional was a slap on the back since he would not have to worry about ballasts anymore. (Tr. 495-6, 507-8). Halbert testified that, while not documented in the January 24, 2012 memo, she reported this information to McMurrian when McMurrian spoke with her during the investigation. (Tr. 508). Halbert also testified that former temporary employee Markus Bernard was present when Craft made this statement. (Tr. 499; RX 14). Finally, as with Coleman, Halbert did not testify at any point that she actually witnessed Craft in the Ballast department showing his warning notice to other employees.

The one employee identified by Coleman and Halbert as a person who allegedly witnessed Craft's conduct, Markus Bernard, testified at the hearing that, after Craft was transferred, he never witnessed Craft come to Ballast department and make any of the statements attributed to him by Coleman or Halbert. (Tr. 147-9). Bernard also testified that he did not make the statements attributed to him by Halbert. (Tr. 148-9). Bernard testified that he had never worked with Craft at any employer other than Respondent. (Tr. 148-9). Finally, Bernard testified that, if such an incident had occurred when he was not present, he would have heard employees discussing the incident as this was the type of situation about which employees would have discussed with him if he was not there when it occurred. (Tr. 147-8).

Craft, in his testimony, specifically denied that he went to the Ballast department after January 20 and made any loud statements about his warning notice or his transfer. (ALJD 11:44-12:1; Tr. 105-6). Craft testified that, after his transfer, he only went near the Ballast department when he was going to or coming from the Professional department or to go to the recharging area

for work issues related to his equipment. (Tr. 105-6). Craft testified that, on the days following January 20, he discussed and showed his warning notice to approximately 10 employees, including Willie Reel, Rainey McAdory, Darrell Leaks, and Uma Jalloh. (Tr. 92). Craft testified that he only discussed and showed the final warning notice before and after work and during break times. (ALJD 11:44-12:1; Tr. 92). Craft said that he also spoke with some employees while they waited in the Consumer area for the pre-shift meeting to start. (ALJD 11:44-12:1; Tr. 93). Craft testified that he told these employees that Respondent was trying to set him up to be fired for lies; that if it was happening to him, it also could happen to them; and that Kim Coleman was the employee claiming that he was harassing her. (Tr. 94-5).

In addition to discussing his warning notice with employees, Craft testified, without rebuttal, that on January 23, he contacted Ed Crawford, who Craft identified as the President of Respondent, by telephone and email. (Tr. 95-7). Craft said he discussed his situation with Crawford and informed him both in the telephone conversation and in an email early the following morning that management at the Memphis facility was harassing employees and that employees were afraid to speak out for fear of losing their jobs. (Tr. 96; GCX 5, p. 15).

H. Craft is Discharged on January 25, 2012

It is undisputed that, during her investigation on January 24, McMurrian did not attempt to meet with Craft to confront him with these allegations or give him a chance to respond. (Tr. 291). Instead, McMurrian made the decision to immediately discharge Craft. On January 25, McMurrian and Odum informed Craft that he was being discharged and then showed him the discharge notice McMurrian prepared. (Tr. 97-9; GCX 7). The warning notice reads that Craft is being discharged for disrupting the operations, sharing confidential documentation and information during working hours, and continuing to use intimidating language toward

management. (GCX 7). The warning notice goes on to read that Craft had been warned against these behaviors on January 20 when he received a final written warning and, when provided with a copy of the warning notice, "was informed of the confidentiality of the discussion and form during this meeting." (GCX 7). Following receipt of this notice, Craft was escorted from the facility. (Tr. 97-9).

In her decision, the Judge does not specifically refer to the language of the discharge notice in describing the reasons for Craft's discharge. (ALJD 8:21-26). Instead, the Judge states that McMurrian testified that Craft's behavior was grounds for discharge for two reasons: Craft's conduct on January 24 in the Ballast area and his prior conduct violated Respondent's harassment free workplace policy and Craft disregarded her directive to stay out of the Ballast area after his transfer. (ALJD 8:21-26). Notably, neither of these reasons is specifically cited in the January 25 discharge notice. (GCX 7). McMurrian testified that her reference to Craft disrupting operations was that he was not in his work area during working hours and was disrupting others from doing their work when he went to the Ballast department and made statements about his final warning and transfer. (Tr. 228). McMurrian said that this also included the claim that Craft was discussing his final warning with employees during work time. (Tr. 228). McMurrian testified that the threatening statements toward management she referenced in the termination notice were the statements Coleman alleged that Craft made when he came to the Ballast department. (Tr. 228).[12] McMurrian also testified that the decision to discharge Craft was also based on his prior discipline on January 20, 2012 for similar reasons and because he was instructed to stay out of the Ballast department after his transfer. (Tr. 229).

[12] McMurrian claimed that the termination notice should have also included the term, "colleagues" and that her failure to include this was an error on her part. (Tr. 228).

IV. THE JUDGE'S CREDIBILITY FINDINGS ARE INCONSISTENT WITH AND CONTRARY TO THE RECORD EVIDENCE AND SHOULD BE OVERTURNED (Exceptions 1 and 2)

General Counsel recognizes that, pursuant to *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3 1951), it is well established that the Board is reluctant to overturn the credibility findings of an Administrative Law Judge especially when credibility findings are based on a judge's assessment of the demeanor of a witness. See *V&W Castings*, 231 NLRB 912, 913 (1977). However, the Board has held that where a judge's credibility resolutions are not based primarily on demeanor, the Board may proceed to an independent evaluation of credibility. *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979). In addition, even where a judge's credibility findings are based on demeanor, such findings are not dispositive when the testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *E.S. Sutton Realty Co.*, 336 NLRB 405, 407 fn. 9 (2001) (quoting *Humes Electric, Inc.*, 263 NLRB 1238 (1982)).

In her findings and conclusions, Judge Brakebusch relies primarily on the testimony of Respondent witnesses McMurrian, and to a lesser extent, Coleman and Halbert. The Judge also states that she found certain parts of Craft's testimony not credible, including specifically his denial that he went to the Ballast area on January 24 for any reason. As will be explained in detail in the following sections of this brief, the testimony of McMurrian is not supported by relevant evidence presented at the hearing. In addition, Coleman and Halbert provided inconsistent and contradictory testimony, especially concerning the alleged incident where Craft came to the Ballast area on January 24, which the Judge fails to reconcile.

Most importantly however, General Counsel presented testimony from three witnesses, Markus Bernard, Lexie Campbell, and Sherry Grey, which bears directly on the alleged

misconduct for which Respondent discharged Craft but the Judge fails to make any reference whatsoever to the names or testimony of any of these witnesses in her decision. In particular, Bernard, who was identified by both Coleman and Halbert as a witness to Craft's visit to the Ballast area on January 24, specifically denied that he witnessed Craft in the Ballast area on January 24, 2012 or on any other date following January 20, when Craft received his final warning. Campbell and Grey provided testimony concerning Craft's statements during pre-shift meetings and corroborated Respondent witness Lester Peete that Craft did not disrupt the meetings and that Craft made statements during the meeting which would constitute protected activity. Bernard, Campbell and Grey are all former temporary employees of Respondent through Adecco, which employs the temporary employees and maintains an on-site office at Respondent's facility. (Tr. 27, 135-6, 141-143, 154-6, 234-5). Bernard, Campbell and Grey testified without rebuttal that they had worked at Respondent's warehouse through Adecco on two separate occasions and none were discharged by Adecco at end of their second period of employment. (Tr. 27-8, 135-7, 154-6). While none of the three witnesses were current employees, all three at worked at Respondent's warehouse on two separate occasions and could potentially be rehired for additional periods of employment as temporary employees or hired as permanent employees by Respondent. The Judge's failure to discuss, consider or even reference the testimony of three witnesses, who were testifying against their own pecuniary interest was in error and provides an additional basis for overturning the credibility findings of the Judge. See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978) (where the Board stated that the testimony of a current employee against an employer is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest).

In *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 (2011), the Board overturned the credibility findings of the administrative law judge where there was record evidence which contradicted the judge's findings and additional record evidence which the judge did not address in the decision. *Id.* at 5-6. In addition, while the judge in that case generally referenced demeanor, the judge did not specifically refer to the demeanor of any specific witnesses. *Id.* at 5; see also *El Rancho Market*, 235 NLRB 468, 470 (1978). In this case, the Judge's findings are directly contradicted by credible record testimony and evidence, these contradictions are not addressed by the Judge and the testimony of three witnesses, which is directly relevant to the issues in the case, is not addressed or discussed by the Judge in any manner. In addition, while the Judge makes a general reference to witness demeanor at the start of the decision, the Judge does not specifically refer to the demeanor of any specific witness as a basis for her credibility findings. Thus, the General Counsel requests that the Board overturn the credibility findings of the Judge and perform an independent evaluation of credibility in this case.

V. RESPONDENT MAINTAINED AND ENFORCED AN UNLAWFUL RULE PROHIBITING EMPLOYEES FROM DISCUSSING DISCIPLINE WITH OTHER EMPLOYEES (Exception 9)

In her decision, the Judge dismissed the complaint allegation that, since January 19, 2012, Respondent maintained a rule that discipline is confidential and prohibited employees from sharing and/or discussing their discipline with their coworkers. (ALJD 9-11). The Judge correctly recognizes that Respondent's employee handbooks do not contain any rule or policy which provides that discipline is considered confidential or that prohibits employees from discussing discipline with other employees. (ALJD 9:44-45; GCX 2). The Judge also notes that Craft testified that he does not recall being told on January 20 that the discharge notice was confidential and that he was not aware of any policy prohibiting employees from discussing

discipline with other employees. (ALJD 10:1-6; Tr. 127). The Judge further states that McMurrian testified that Respondent does not have a policy prohibiting employees from discussing disciplinary notices. (ALJD 9:46-10:1; Tr. 174). The General Counsel asserts that, despite this testimony, the evidence supports a finding that Respondent maintained and enforced an informal or unwritten rule which provided that discipline forms were confidential and which prohibited employees from showing or discussing their discipline with coworkers. The Judge's decision on this issue is in error for several different reasons.

In her decision, Judge Brakebusch writes that "[d]espite the testimony of both McMurrian and Craft, the General Counsel nevertheless asserts that Respondent unlawfully implemented a policy prohibiting the discussion of discipline on January 19." (ALJD 10:8-10). The Judge later states that, "...there is no credible record evidence that Respondent told employees on January 19, 2012, that they were prohibited from sharing and/or discussing their discipline with coworkers as alleged in complaint paragraph 4." (ALJD 10:46-11:2). Finally, the Judge states that she did not find sufficient evidence that "Respondent told Craft or any other employees on January 19, 2012, that they were prohibited from discussing their discipline with employees." (ALJD 11:14-16). The Judge misstates both the allegation as contained in paragraph 4 of the complaint and the General Counsel's position concerning this allegation. The General Counsel does not assert or argue that Respondent implemented the alleged unlawful policy on January 19, 2012 or that Respondent told or informed employees on January 19, 2012 about a policy prohibiting them from discussing discipline with coworkers. Instead, the General Counsel argues that, as evidenced by the written statements of McMurrian in the January 24, 2012 investigation memo and Craft's January 25, 2012 discharge notice, and Respondent's decision to discharge Craft, in part, for sharing confidential documentation and information with

coworkers, the evidence establishes that Respondent **maintained** this unlawful rule and/or enforced this rule against Craft. The Judge's finding that there was insufficient evidence to show that Respondent implemented and informed employees about this policy on January 19, 2012 are in error and should be reversed.

The General Counsel does assert that, despite McMurrian's denials, the January 24, 2012 investigation memo prepared by McMurrian and the January 25, 2012 discharge notice also prepared by McMurrian establish that Respondent maintained and enforced against Craft an unwritten rule that disciplinary notices are confidential information and which prohibits employees from discussing discipline with other employees. McMurrian wrote in the January 24 investigation memo, "These employees are aware that Disciplinary action forms are confidential information and should not be shared on the warehouse floor at anytime, much especially during working hours." (RX 14). McMurrian also wrote, in this same memo, "[Coleman and Halbert] told me what was in the write-up, which confirmed he had to be showing the other employees the form." (RX 14). Finally, Craft's January 25 discharge notice, prepared by McMurrian, reads that Craft was discharged in part for "sharing confidential documentation and information" with other employees and that, after he was provided a copy of the January 20, 2012 final warning, Craft was informed of the confidentiality of the discussion and discipline form. (GCX 7).

Concerning the statements in the January 24 investigation memo, McMurrian testified that Coleman was the person who raised the issue of confidentiality in relation to Craft discussing his discipline with co-workers and she understood that Coleman did this because Coleman thought discipline is confidential. (Tr. 289). Coleman testified that she informed McMurrian that she thought discipline forms were confidential because she thought employees should keep this information to themselves. (ALJD 10:30-34; Tr. 386). Coleman also testified

that, when she informed McMurrian that Craft was discussing his discipline with other employees, McMurrian told her only, "Why would he want to do that? Why would he want to show that?" (ALJD 10:34-38; Tr. 387-8). Coleman said that McMurrian did not inform her that employees are free to discuss discipline with co-workers or correct Coleman's misunderstanding. (ALJD 10:34-38). McMurrian did not provide any testimony concerning her direct response to Coleman when Coleman provided her with this information.

From this testimony, the Judge concludes that Coleman was the individual most concerned with Craft's actions in telling employees about his discipline. (ALJD 10:40-41). The Judge then states that, while McMurrian may have referenced in the January 24 memorandum that Craft showed his disciplinary notice to employees and that Coleman raised the confidentiality of the discipline, this evidence does not support a finding that Respondent told employees on January 19, 2012 that they were prohibited from sharing or discussing discipline with co-workers. (ALJD 10:44-11:2).[13] However, this conclusion ignores McMurrian's own words as contained in the January 24 memo. McMurrian wrote, "These employees **are aware** that discipline forms are confidential and **should not be shared** on the warehouse floor, at anytime. (RX 14)(emphasis added). McMurrian did not state that employees "believed" or "thought" discipline forms were confidential and should not be shared with co-workers; instead she wrote that they were "aware" of the confidentiality of the discipline forms. McMurrian also wrote that Coleman said Craft was "purposely showing the write-up which he **knows** is

[13] Throughout this section and other sections of her decision, the Judge repeatedly states that witnesses claimed that Craft returned to the Ballast area on January 24 where he made the comments attributed to him by Coleman and that he showed his warning notice to employees on that same date. (See ALJD 8:22, 8:42, 10:45, 11:41-42, 12:3-4, 12:20, 12:27, 13:9, 15:10, 15:14-15; 15:27) This misstates the testimony of the witnesses. Both Coleman and Halbert testified that Craft made the comments about his warning notice in the Ballast area on the same date he received the discipline, January 20, and Fred Smith's statement to Odum did not identify the date when Craft allegedly came to him and showed him the discipline form. (Tr. 355, 494-5; RX 14). Craft testified that he showed his warning notice to employees over the course of the five days prior to his discharge. (Tr. 92-95). As explained later in this brief, this misunderstanding of the facts to which the witnesses testified motivated and influenced the Judge's finding that Craft's testimony on this issue was not credible.

confidential information..." (RX 14) (emphasis added). Again, McMurrian states that Coleman knew the document was confidential and did not state that Coleman mistakenly believed or thought it was confidential. Lastly, McMurrian never took any steps to correct Coleman or Halbert's alleged misunderstanding concerning the confidentiality of the discipline forms. The statements as written by McMurrian on January 24 go beyond a reference to Coleman raising the confidentiality of the discipline forms and instead reflect McMurrian's understanding that discipline forms are confidential and that Craft was engaged in misconduct when he shared the January 20 discipline form and details of the discipline meeting with other employees.

As to the January 25, 2012 discharge notice, where McMurrian wrote that Craft was being discharged in part for sharing confidential documentation and information during work hours and that Craft was informed of confidentiality of the form and discussion during the January 20 meeting, the Judge found that this document also does not support a finding that Respondent maintained an unlawful rule. (ALJD 11:4-19; GCX 7). In finding that the January 25 discharge notice does not provide sufficient evidence that Respondent implemented or established an unlawful rule on January 19, the Judge only discusses the statement that Craft "was informed of the confidentiality of the form and discussion," while ignoring that Craft was specifically disciplined because he "shared confidential documentation and information" with co-workers. (ALJD 11:4-19; GCX 7). The Judge states that McMurrian testified that she included the reference to Craft being informed of the confidentiality of the final warning form and discussion on Craft's discharge notice because Craft asked, in the January 20 discipline meeting, if the Employer would keep his discipline confidential. (ALJD 11:6-9).[14] McMurrian testified that she simply reassured Craft that "our discussion was in confidence in that room,"

[14] Craft testified that he did not recall asking this question or being told by McMurrian that managers and supervisors would keep his discipline confidential. (Tr. 133).

and "we don't go out and talk about his disciplinary action on the floor." (Tr. 290-1).[15] The Judge states that, because Craft did not testify that McMurrian told him that his final warning was confidential, it is reasonable to find that McMurrian simply assured Craft that managers and supervisors would keep the discipline confidential and this was the reason that she included this statement in his discharge notice. (ALJD 11:9-14).

McMurrian's testimony and the Judge's finding on this issue are reasonable only if McMurrian's statement that Craft was provided with a copy of the warning and was informed of the confidentiality of the form and discussion are taken out of context. Quite simply, if McMurrian's testimony is assumed to be true, there was no logical reason for McMurrian to put this statement on Craft's discharge notice as it serves no purpose to inform Craft or any reviewing official why Craft was discharged. The issue of whether managers and supervisors would keep the discipline confidential is completely irrelevant to the reasons for Craft's discharge. However, when properly considered in context with McMurrian's statement that Craft was being discharged in part for revealing confidential documentation and information, the inclusion of this information becomes obvious: Craft was, according to the preparer of the discharge notice, told that the January 20 final warning and the information discussed in the discipline meeting was confidential and, by sharing this information with other employees, violated this policy or directive.

Under the Act, employers may not lawfully prohibit employees generally from engaging in protected concerted activity by discussing discipline with other employees. *Cellco Partnership d/b/a Verizon Wireless*, 349 NLRB 640, 658 (2007); *SNE Enterprises, Inc.*, 347 NLRB 472, 492

[15] McMurrian did not explain why, if Craft was the person concerned about the confidentiality of the final warning, his discussion of the final warning with other employees was a basis for discipline or why she felt it necessary to reiterate in the discharge notice that Craft was informed about the confidentiality of the January 20 final warning and the matters discussed in the January 20 discipline meeting.

(2006); *Westside Community Mental Health Center, Inc.* 327 NLRB 661, 666 (1999). Based on the evidence presented, the documents prepared by McMurrian are clear in their meaning and intent: While Respondent did not have a written rule that discipline was confidential information and not to be discussed with other employees, she and management at the Memphis facility maintained such rules and enforced these rules against Craft by discharging him for discussing his discipline with other employees. Thus, the Judge's finding that Respondent did not maintain an unlawful rule which provided that discipline was confidential and that employees were not permitted to share or discuss discipline with co-workers should be reversed. In addition, as the documents establish that Craft was discharged because of Respondent's enforcement of this unlawful rule, Craft's discharge should also be found to be an unlawful enforcement of this rule.

VI. RESPONDENT UNLAWFULLY DISCHARGED LEE CRAFT BECAUSE OF HIS PROTECTED CONCERTED ACTIVITY (Exceptions 10-18)

In her decision, Judge Brakebusch utilized a *Wright Line* analysis to determine whether Craft was discharged because of his protected concerted activities. In cases where the employer's motivation for a personnel action is in issue the Board utilizes the test outlined in *Wright Line,* 251 NLRB 1083 (1980) *enfd.,* 662 F.2d 800 (1st Cir. 1981), *cert denied,* 455 U.S. 989 (1982). To establish a violation under *Wright Line,* the General Counsel bears the initial burden of showing that protected concerted activity was a motivating or substantial factor in the adverse employment action. The three elements commonly required to support such a showing are: (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity; and (3) the adverse action taken against the employee was motivated by the activity. *Case Farms* of *North Carolina,* 353 NLRB 257 (2008). If these elements are met, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Id.* If, however, the

evidence establishes that the reasons given for the employer's action are pretextual - that is, either false or not in fact relied upon - the employer fails by definition to show that it would have taken the same action for those reasons, and no further analysis is required. *SFO Good-Nite Inn,* 352 NLRB 268, 269 (2008).

A. While the Judge Correctly Found that General Counsel Met Its Burdens Under *Wright Line*, the Judge's Factual Findings to Support This Conclusion Are Incomplete and In Error (Exceptions 7, 8, 10-2, and 14)

In this case, the Judge correctly found that Craft, by discussing his discipline with co-workers, was engaged in protected concerted activity. (ALJD 11:6-13). The Judge also correctly found that Respondent was aware of Craft's protected activity or believed that he had engaged in protected activity. (ALJD 12:18-29). Lastly, the Judge correctly found that Craft's discharge was motivated in part by discussing his January 20 final warning with co-workers. (ALJD 13:8-13). Despite these correct legal findings, the facts on which the Judge bases her findings are in error as she misstates the evidence as presented at the hearing.

As noted previously in footnote 13, throughout her decision, the Judge repeatedly states that the conduct cited by Respondent as the basis for Craft's discharge occurred on January 24, 2012 and that this finding is supported by the credible testimony of Coleman and Halbert. (See ALJD 8:22; 8:42; 10:45; 11:41-42; 12:3-4; 12:20; 12:27; 13:9; 15:10; 15:14-15; and 15:27). This misstates the testimony of the witnesses. Both Coleman and Halbert testified that Craft made the comments about his warning notice in the Ballast area on the same date he received the January 20 final warning. (Tr. 355, 494-5). Coleman testified that, on the day Craft allegedly drove his forklift back to the Ballast area and made loud comments about his discipline and transfer, "he had got a wrote-up this particular day." (Tr. 355, ll. 14-15). Halbert testified that Craft had been up in the office and was carrying a piece of paper when he commented about his transfer to Professional. (Tr. 494-5). Neither witness directly testified that any of this conduct

actually occurred on January 24. Furthermore, the January 24 investigation memo does not state that Coleman claimed that Craft returned to Ballast on his forklift on January 24; instead, it merely reports what she claims Craft had done without specifying the date on which the conduct took place. (RX 14). In addition, in the January 24 memo, neither Coleman nor Halbert identify any date when Craft was observed in Ballast speaking with other employees about his final warning and neither testified at the hearing that they ever personally observed Craft on any date showing his warning notice to employees. Lastly, Fred Smith's statement to supervisor Odum, as documented in the January 24 memo, does not identify the date when Craft allegedly came to him and showed him the discipline form and neither Smith nor Odum testified at the hearing. (Tr. 355, 494-5; RX 14). While McMurrian, in her testimony, says that the incidents documented in the January 24 memo occurred on that same day, her assertions about the date are not supported by any of the other testimony or evidence presented at the hearing. Thus, the Judge's finding that all of the actions which Respondent asserts formed the basis for its decision to discharge him occurred on January 24 is contradicted by evidence as presented at the hearing, including Respondent's own witnesses.

To briefly summarize the Judge's factual basis for finding that the General Counsel met its *Wright Line* burdens, the Judge found that, on January 24, 2012, Craft returned to the Ballast area and made loud comments close in proximity to Coleman and spoke with other employees about his discipline. (ALJD 11:35-12:4). The Judge states that, by speaking with other employees about his discipline on that date, Craft was engaged in protected activity. (ALJD 12:6-13). The Judge then states that, even though Craft denied going to the Ballast area on January 24 (which the Judge characterizes as a denial that he engaged in protected activity on that date), Respondent reasonably believed that he had returned to the Ballast area on January 24

and engaged in protected activity. (ALJD 12:17-29). The Judge then states that, because McMurrian identified Craft's discussion of his final warning with co-workers in her January 24 memo and the January 25 discharge notice, Craft's protected activity was a motivating factor in his discharge. (ALJD 12:33-13:13).

As explained at length in this brief, the Judge's factual findings concerning Craft's protected activity are contrary to and not supported by the evidence presented at the hearing. First, Craft not only engaged in protected activity following his January 20, 2012 final warning but had been engaging in protected activity for an extended period of time prior to that date. The witnesses at the hearing testified that Craft had repeatedly spoken with employees about what he perceived to be problems at the facility directly related to the way the facility was managed by McMurrian, Turner and the other supervisors. In one instance, he told lead employee Edwards that he was going to start making changes around the facility and employees should not have to "kiss butt to move up the ladder." (RX 16). Respondent witness Lester Peete testified that, in the pre-shift meetings during the Minute to Shine, Craft spoke about doing what he had to do to make some changes and make things better around the facility and that employees had to work together and look out for each other. (Tr. 415, 422-3; RX 18). Also, in his emails to Respondent human resources representative Dwivedi and President Crawford, Craft wrote about unfair and abusive treatment toward employees by Turner, McMurrian and other supervisors at the Memphis facility. (GCX 5). Craft's actions in showing and discussing his January 20, 2012 final warning with other employees on non-work time were merely an extension of his earlier protected activities.

Second, Respondent was aware that Craft had engaged in these protected activities, as demonstrated by McMurrian's testimony and the documentary evidence presented at the hearing.

In his first email to Dwivedi on October 30, 2011, Craft raised allegations of mistreatment against him and other employees by McMurrian and Turner. (GCX 5, p.1). Respondent was also aware of Craft's statements during the Minute to Shine, as demonstrated by the statement McMurrian secured from lead employee Lester Peete on January 3, 2012. (RX 18). McMurrian also testified that employees had reported to her about Craft's statements and songs during the Minute to Shine in 2011 (Tr. 275-6). Turner testified that she was also aware of Craft's statements during the Minute to Shine during 2011. (Tr. 466-7). During her investigation of Craft starting in December 2011, McMurrian, after receiving information from Coleman, spoke with lead employee Antonio Edwards, who confirmed that Craft said that he was going to start making some changes there and make it so employees do not have to kiss butt to move up the ladder. (RX 11, 16). McMurrian testified that she found that comment and others by Craft to be negative, demoralizing and evidence that he was working against Respondent. (Tr. 269-70; RX 11). Finally, as discussed above, Respondent was aware that Craft was discussing his January 20, 2012 final warning with other employees on dates between January 20 and January 24, 2012.

Lastly, the evidence establishes that Respondent's decision to discharge Craft was motivated by his protected activities. McMurrian's January 24 memo places the greatest emphasis on the allegations that Craft was discussing his warning notice with other employees on unspecified dates after January 20, 2012. (RX 14). As McMurrian stated in the memo, "They told me what was in the write-up, which confirmed he had to be showing the other employees the form." (RX 14). Then, in his discharge notice, McMurrian wrote that Craft was being discharged, in part, for "sharing confidential documentation and information" with other employees. (RX 14).

The evidence in the record further proves that Respondent's decision to discharge Craft was motivated by its demonstrated animus toward Craft's prior protected activities. In the January 16, 2012 memo recommending Craft's discharge, McMurrian wrote that "the comments he was making in the pre-shift meetings and to other employees were being perceived as him working against the company and were threatening in nature." (RX 11). McMurrian said the comments, including, "we have to stop this now," and "we do not need to kiss butt to move up the ladder," were negative, intimidating and demoralizing. (RX 11). McMurrian states that these comments to employees and during meetings are intended to undermine the efforts of the company and management team and are unacceptable. (RX 11). McMurrian then states that Craft was disrupting and interrupting operations by his comments during the pre-shift meetings. (RX 11). Then, in the January 20, 2012 final warning, McMurrian writes that Craft is being disciplined for his "highly disruptive behavior in pre-shift meetings" and his intimidating behavior towards management. (GCX 6). From this document and McMurrian's testimony, the January 20, 2012 final warning was motivated by Craft's protected activities prior to January 20, 2012.

The January 20, 2012 final warning was not alleged as unlawful in the complaint as no charge was ever filed by Craft raising this allegation. On this issue, the General Counsel would ask the Board to take note that the original charge in this case was not filed by Craft until July 19, 2012, immediately prior to the expiration of the 10(b) six-month period for filing charges. However, even when the Board may be unable to remedy unfair labor practices established by the record evidence but which are time-barred pursuant to Section 10(b) of the Act, the Board may still rely on evidence of the time-barred unfair labor practices to show a history or pattern of animus by an employer toward employee Section 7 rights. The Supreme Court held that, "When

occurrences with the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices...earlier events [occurring outside the six-month limitations period] may be utilized to shed light on the true character of matters occurring within the limitations period," and Section 10(b) "does not bar...evidentiary use of anterior events." *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 416 (1964); see *Monongahela Power Company*, 324 NLRB 214 (1997); *Commercial Cartage Company*, 273 NLRB 637, 647 (1984). In this case, the Judge was in error by finding that there was no evidence that Craft had engaged in any protected activity prior to January 20, 2012; by failing to find that Respondent had demonstrated animus toward Craft because of his protected activities prior to January 20, 2012; and by failing to find that his January 20, 2012 final warning was motivated by his protected activities. (ALJD 14:20-22, 15:10-12).

B. The Judge Incorrectly Determined that Respondent Would Have Discharged Craft in the Absence of his Protected Activity (Exceptions 12-18)

Despite her finding that Craft's discharge was motivated by his protected activity, the Judge found that Respondent met its burden to show that it would have discharged Craft in the absence of his protected activity. (ALJD 13-16). The Judge first writes that, on January 16, 2012, McMurrian and the other management personnel had made a joint decision to discharge Craft for several different reasons. (ALJD 13:23-14:11). The Judge writes that, in the January 16 memo recommending Craft's discharge, McMurrian stated that Craft had engaged in intimidating and harassing behavior towards Coleman and management; that supervisor Turner reported that Craft had repeatedly attempted to undermine and belittle her decisions and demonstrated a lack of respect for her; and that he had interfered with operations and engaged in disruptive behavior by his statements during pre-shift meetings and to other employees. (ALJD 13:23-35). As noted in the previous section, this first decision to discharge Craft (which led to

his January 20, 2012 final warning) was motivated in large part by Craft's protected activities. The evidence also establishes that the other reasons cited by McMurrian in the January 16 memo were pretextual and not supported by any credible or corroborated evidence. As explained at length earlier in this brief, Coleman's allegations of harassment by Craft were either discredited (including her claims that Craft was recording her conversations or photographing her work) or not corroborated (including her claim that Craft said she needed to get on her knees and apologize to him) at the time of the investigation.[16] As to Coleman's claims of general harassment, neither Coleman nor Halbert ever provided any specific details about these incidents or dates when the incidents occurred. As to Turner's claim that Craft belittled and undermined her, the only specific examples offered by Turner in her testimony to support this claim were that Craft would not come to her with complaints and was going directly to McMurrian and Dwivedi (which Craft had been directed to do after making complaints through Respondent's employee hotline). Turner testified that she never documented any incident where Craft belittled and undermined her. McMurrian testified that she did not document her interview with Turner for the investigation of Craft. (Tr. 439, 467-8).

The Judge then notes that Respondent did not discharge Craft as intended because it had not first issued him a final warning. (ALJD 14:13-22). The Judge states that the January 20, 2012 final warning reads that Craft was being issued the discipline because of his highly disruptive behavior in pre-shift meetings; because of his harassing and intimidating behavior toward colleagues and toward management; because "several" employees had reported feeling threatened and two performance issues for incidents on January 4 and January 16. (ALJD 14:16-

[16] Recall that at the time of the investigation, Halbert's claim that she witnessed this incident was not documented by McMurrian and McMurrian testified only that Halbert informed her that she found out about the incident after Coleman told her what had happened. Only at the hearing did Halbert suddenly recall for the first time that she witnessed the incident.

22). Again, as established in the previous section, this final warning was motivated in large part by Craft's protected activity and the claims that employees felt threatened are not supported by the evidence. As to the performance issues, considering that these were not referenced or cited by McMurrian in her January 16, 2012 memo recommending Craft's discharge, these incidents were not part of the stated reasons for the original decision to discharge Craft. (RX 14).

The Judge then writes that, even though McMurrian wrote that Craft was being discharged in part because he shared confidential documentation and information with other employees, Respondent would have discharged Craft in any event for the other reasons as stated in the discharge notice. (ALJD 14:30-40). The Judge states that McMurrian credibly testified that Craft was discharged because he disrupted the operations, used intimidating language toward management and violated her unwritten instructions when he returned to the Ballast area on January 24 to make comments near Coleman and show his warning notice to employees in the Ballast area. (ALJD 14:42-45). As explained previously, the Judge's finding that all of Craft's alleged misconduct occurred on January 24 is not corroborated by Respondent's other witnesses or any documentary evidence and was in error. In addition, while Coleman claimed that both Halbert and Markus Bernard witnessed Craft's actions in the Ballast area, Halbert did not corroborate Coleman's version of events in any manner and Markus Bernard, whose testimony was ignored by the Judge, specifically denied that the incident occurred. Also, neither Coleman nor Halbert testified that they witnessed Craft in the Ballast area showing or discussing his warning notice with employees and McMurrian did not document that either witness saw Craft showing his warning notice to employees in the Ballast area. (RX 14). Lastly, Fred Smith, the only individual who claimed that Craft showed him the final warning during working time, did not testify at the hearing and Respondent did not present other evidence to authenticate Smith's

signature on the January 24, 2012 memo. Thus, the reasons cited by McMurrian for Craft's discharge were either unlawful or not supported by the record evidence and thus pretextual.

The Judge then states that McMurrian's decision to discharge Craft is also supported by the statement in the discharge notice which reads that Craft "received a final written disciplinary notice warning against these exact behaviors on 1/20/2012," where Craft was disciplined for disruptive behavior and intimidating behavior toward colleagues and management. (ALJD 14:44-15:2). The Judge concludes that Craft's conduct on January 24 was consistent with the conduct on which Respondent based its earlier decision to discharge him on January 16 and which occurred prior to any protected activity. (ALJD 15:8-12). Again, as explained previously, the record evidence establishes that Craft had engaged in protected activity prior to January 16, 2012; that Respondent was aware of this prior protected activity; that Respondent decided to discharge and issue a final warning to Craft because of this protected activity; and the other reasons cited by McMurrian in her January 16, 2012 memo as a basis for discharging Craft were pretextual.

The Judge then states that, because Craft denied that he returned to the Ballast area on January 24, the General Counsel is "forced to argue that Craft discussed his discipline with employees during the period between January 19, 2012 and January 24, 2012." (ALJD 15:14-18). The Judge notes that "neither McMurrian's memorandum of January 24, 2012 nor Craft's termination notice reference any dates of alleged misconduct other than January 24, 2012." (ALJD 15:19-20). The Judge concludes, based on the documentary evidence, McMurrian's testimony and the information provided by other employees, McMurrian determined that Craft disregarded her instructions to stay out of the Ballast department and that he was engaging in the same conduct for which he had previously been warned. (ALJD 15:20-25). However, as

explained previously, the January 24 memo, except for a reference to the date at the top of the page, does not specify that Coleman, Halbert or Smith informed McMurrian that Craft's actions took place on January 24. In addition, both Coleman and Halbert testified at the hearing that the alleged incident where Craft made comments about his warning occurred on the date he was disciplined and transferred to the Professional department, identified as January 20. In addition, neither Coleman nor Halbert testified at the hearing that they personally witnessed Craft in the Ballast department on January 24 or any other date discussing his warning notice with other employees. Lastly, Smith did not testify at the hearing and McMurrian did not testify that she spoke directly with Smith about claim that Craft discussed his warning notice with Smith during working hours in the Professional department. In sum, the only evidence to support the Judge's conclusion that Craft was in the Ballast area on January 24 is McMurrian's assertion that the events described in her January 24 memo occurred on that date and McMurrian's notation on the January 25 discipline form, under "Date of Incident" that the incident occurred on January 24. Thus, the Judge's finding that Craft returned to the Ballast department on January 24 is not supported by the credible evidence and is actually contradicted by two of Respondent's own witnesses.

The Judge goes on to note that, when Craft discussed his discipline with other employees, on January 24 or any other date, he informed employees that Coleman was the accuser who as responsible for his discipline and transfer. (ALJD 15:35-36). The Judge states that, by informing employees about Coleman's identity, he was going beyond and arguably motivated to accomplish more than "simply sharing what Respondent had done to him." (ALJD 15:29-32, 34-36). The Judge concludes that, as Coleman perceived the revelation of her name to other employees as additional harassment, it was reasonable for McMurrian to determine that Craft

was again harassing Coleman and engaging in the same conduct for which he had previously been disciplined. None of Respondent's witnesses testified at the hearing, or claimed during McMurrian's investigation, that Craft threatened, disparaged or attempted to incite employees to retaliate against Coleman when he revealed her name. In addition, the Judge does not argue that, by revealing Coleman's identity to other employees, Craft engaged in any conduct which would cause him to lose the protection of the Act. In this case, Craft's revelation of Coleman's name to other employees when he discussed him January 20 final warning with them was part and parcel of his protected activity. Respondent's decision to discipline Craft in part because he told other employees the name of his accuser would thus also violate the Act.

The Judge then references the Supreme Court's decision in *NLRB v. Burnip & Sims, Inc.*, 379 U.S. 21, 22 (1964), where the Court held that that an employer violates the Act if it is shown that a discharged employee engaged in protected activity, the employer knew it was protected activity, that the employee engaged in an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of the misconduct. The Judge then notes that the Court held that an employer's honest belief that an employee engaged in misconduct when also engaged in protected activity provides a defense to a charge of discrimination absent a showing that the employee did not, in fact, engage in the alleged misconduct. *NLRB v. Burnip & Sims, Inc.*, 379 U.S. at 22; *Westinghouse Electric Corp.*, 296 NLRB 1166, 1173 (1989). The Judge states that the evidence in this case is not sufficient to establish that Craft did not engage in the misconduct reported to McMurrian by other employees and which Respondent asserts was the basis for Craft's discharge. (ALJD 15:41-16:3). However, as explained above, the evidence presented at the hearing demonstrates that Craft did not engage in the misconduct attributed to

him by Respondent and that the Judge's conclusion that the General Counsel presented insufficient evidence to show that he did not engage in misconduct is in error.

The evidence also establishes that Respondent did not have an honest belief that Craft actually engaged in the misconduct attributed to him. Respondent, by McMurrian, had already demonstrated hostility toward Craft's protected activity by disciplining him on January 20, 2012 for complaints Craft expressed to other employees which McMurrian testified were negative, demoralizing and seen as working against Respondent and its management team. Then, when faced with accusations that Craft had engaged in additional misconduct which could lead to his discharge, McMurrian engaged in a sham investigation of Craft. Following reports of misconduct by Craft, McMurrian spoke directly only with Coleman, who had made prior spurious accusations against Craft, and Halbert, Coleman's close friend and confidante. McMurrian made her decision to discharge Craft solely on the allegations made by Coleman and Halbert and a second-hand report from supervisor Odum. McMurrian admitted that she did not inform Craft about the accusations against him or provide him with an opportunity to explain or deny the alleged misconduct. Despite Halbert informing McMurrian that Markus Bernard allegedly observed Craft's conduct, McMurrian did not attempt to question Bernard about Craft. In addition, McMurrian did not attempt to speak with any other employee or temporary employee working in the Ballast area to corroborate the claims made by Coleman and Halbert. The Board has held, "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *Bantek West, Inc.*, 344 NLRB 886, 895 (2005) citing *K&M Electronics, Inc.*, 283 NLRB 291 fn. 45 (1987). The Board has further held that an employer's failure to conduct a fair or meaningful investigation or provide the accused an opportunity to respond to